No. 10748

IN THE

# United States

# Circuit Court of Appeals

## For the Ninth Circuit

MARTIN CULJAK and JOSEPH ZELKO, co-partners in business under the firm name and style of CULJAK & ZELKO, Appellants,

vs.

DEL E. WEBB, doing business under the name and style of DEL E. WEBB CONSTRUCTION CO., and WHITE & MILLER, CONTRACTORS, INC., a corporation, Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

# Brief of Appellees



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# INDEX

## TABLE OF CASES



## TEXTBOOKS



## FEDERAL RULES OF CIVIL PROCEDURE

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## BRIEF OF APPELLEES

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### DEFENDANTS' STATEMENT OF THE CASE

Plaintiffs' statement of the case is based largely upon the testimony of plaintiffs' witnesses. The testimony of other witnesses contradicting plaintiffs' testimony has been disregarded. This is true, also, throughout the argument in plaintiffs' brief wherever a discussion of the evidence appears.

The trial court found facts in favor of the defendants. If there is any substantial evidence to support its findings, then this court should disregard plaintiffs' testimony to the contrary. We will endeavor

to make a statement of the case based upon the entire evidence.

This case is based upon a violation of an equipment rental agreement between plaintiffs and defendants, whereby plaintiffs rented to defendants a certain trenching machine (R.5). This agreement recites that the machine was rented to the defendants to construct for the Government a complete cantonment group at or near Fort Huachuca (R.6). No mention is made in the agreement of the nature of the soil at Fort Huachuca.

It is provided in the agreement that all necessary minor or field repairs upon said trenching machine shall be made by the lessee without cost to the lessor. Other than minor or field repairs shall be made by the lessor without cost to the Lessee (R.7).

The complaint for the recovery of damages for the violation of this agreement alleges that defendants failed, during said rental period, to make necessary minor and field repairs upon said trenching machine, and that by reason of defendants' failure in this respect and as a direct and proximate result thereof, the said trenching machine, when returned to plaintiffs on or about April 7, 1941, was in a damaged, deteriorated and unfit condition and was not in a condition to render efficient, economic and continuous service, and was not in the condition in which it was received by defendants from plaintiffs, reasonable and ordinary wear and tear excepted.

The plaintiffs further alleged that for the purpose of having said trenching machine restored to the same reasonable condition as when delivered by plaintiffs to defendants, as aforesaid, plaintiffs

were obliged to expend and did expend and pay the sum of Two Thousand One Hundred and 38/100 Dollars ($2,100.38) for reasonable repairs to said trenching machine, which repairs were made necessary by defendants' failure to have necessary and minor field repairs made to said trenching machine as from time to time needed, and that by reason of defendants' failure to make said repairs, and as a direct and proximate result of such failure, while in use by said defendants under said rental agreement, plaintiffs have been damaged in said sum of Two Thousand One Hundred and 38/100 Dollars ($2,100.38) (R. 3-4).

The plaintiffs further alleged that they were deprived of the use of said machine for a period of thirty days necessarily consumed in making said reasonable repairs; that the reasonable monthly rental value of said trenching machine is Fifteen Hundred Dollars ($1500.00), and that plaintiffs were further damaged by reason of defendants failure to make said repairs in the sum of Fifteen Hundred Dollars ($1500.00). Plaintiffs prayed judgment for Three Thousand Six Hundred and 38/100 (3,600.38) Dollars and costs (R. 3-5).

Later on plaintiffs filed a Bill of Particulars showing the damages on the machine to be: cost of parts used in repairing, $2,021.05; the cost of labor employed in making the repairs, $498.75, making a total of $2,519.80. (R. 17, 18, 19).

The defendants in their answer admit the allegations of the complaint as to the lease and the good condition of the machine when leased, but deny each and every other allegation contained therein (R. 22).

This trenching machine, at the time of the lease, was twenty years old (R. 92). The cost of this trenching machine new, with the attachments, is in the neighborhood of $16,000 or $17,000 (R. 91). Plaintiffs purchased the machine in 1930 (R. 40).

The trenching machine was shipped from Los Angeles to Fort Huachuca, Arizona, about December 1st, 1940, where it was operated by defendants and returned to Los Angeles about April 16th or 17th, 1941, and the total amount received by plaintiffs for the use of the machine during that time was $8,225.00 (R. 43).

That while the trenching machine was being operated at Fort Huachuca, the defendants expended the sum of $4,211.13 in making the necessary minor or field repairs (R. 24-27).

When the trenching machine was returned to the plaintiffs at Los Angeles it was in as good condition as when it was delivered, except for the pads on the caterpillar treads and except for the fact that there were welded buckets instead of new buckets (R. 103).

In presenting their case in chief, the plaintiffs introduced three witnesses, Martin Culjak, one of the plaintiffs, and Pat Devine, one of the owners of the machine, and their attorney, Frank J. Barry.

Martin Culjak testified that he did not remember making any repairs on the machine from the time it was returned from Fort Huachuca until they started to overhaul it during the last part of August, 1941 (R. 42).

Devine testified that from the time the machine returned from Fort Huachuca until August 28th,

1941, he made minor repairs. He repaired the conveyor chains; he took out twisted links and put in new ones; he repaired maybe 25 links. "We had those links in the warehouse. I put them in at Longridge on the first trip there. They are different links. I did not put in any chain links such as referred to here. I put none of such links in at Magnolia or Longridge." (R. 62, 63).

On the 28th day of April, 1941, a few days after it was returned to plaintiffs at Los Angeles from Fort Huachuca, the trenching machine was put to work by the plaintiffs on the Longridge sewer job near Los Angeles in place of a smaller machine which could not do the work. It was there worked continuously on that job until May 7th, 1941, when it was moved over to the Magnolia Blvd. job, a distance of about sixteen miles, and used there until June 11th, 1941, when it was moved back on the Longridge Avenue job and again put to work on that job and kept there until that job was finished on July 22, 1941 (R. 113).

While on the Longridge job and the Magnolia Blvd. job, according to Leslie H. Snelling the City Inspector for Los Angeles on those jobs, this machine seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do (R. 116).

Mr. Collins testified, after describing the new tractor pads and the new links, "all those parts—but the biggest cost of the repairing is what we call a major repair, and this is a major repair," and that by the word "major" he meant that it is the most costly part of the machine (R. 80).

Pat Devine, explaining what a hard job it was to replace the pads, testified: "The work done by Aranbel was necessary and so was the work done by all of us. It is a hard job to take those tracks off and put them in. We would have to have more men than that if I did not have the crane there." (R. 58).

The plaintiff ordered the repairs on July 26, 1941.

The work to repair the machine began on August 28, 1941, and was completed on September 17, 1941, covering a period of twenty-one days (R. 18, 19).

## ARGUMENT

### FIRST ASSIGNMENT OF ERROR. MACHINE WHEN LEASED TO DEFENDANTS.

We shall now consider appellants' argument beginning on page 15 of their Brief.

This Finding of Fact 3, that the machine was purchased in 1930, and had never been repaired, which plaintiffs make their first assignment of error, is an understatement of what the evidence fully revealed, to-wit: "A trenching machine isn't run every day of the year, and we figure a 20 year life. It is not 20 years of actual operation, but 20 years from the time it was bought until the termination of that particular time. The average machine runs about 10 years in 20, but we take it, if a man wants to buy a piece of equipment, the first thing he asks is, "When was that bought?" When I say that this was bought in 1920, that makes it 20 years old." (R. 92). (Appellants' Brief 13, 14 and 15.)

It is to be expected that the age of a piece of machinery is to be considered in estimating its workable condition, and the fact that it had not been repaired any for ten years also indicates that it would be in need of other than necessary minor or field repairs.

## SECOND, THIRD AND SIXTH ASSIGNMENTS OF ERROR

Plaintiffs contend that Finding of Fact 7: stating that the defendants expended $8,250.00 in rentals and $4,211.13 for labor, was wholly immaterial (Appellants' Brief 15-21). In that case the finding was harmless and not prejudicial. However, the fact that $8,250.00 was paid plaintiff for the use of the machine for four months seventeen days shows a handsome dividend upon a $16,000 to $20,000 investment, (R. 14, 91), and reflects why other than necessary minor or field repairs were to be made by plaintiffs. Then, again, the fact that the defendants expended $4,211.13 in repairs indicates that they were making the necessary minor or field repairs, as required by the equipment agreement, even though thy did not furnish a new set of tractor pads which Collins described as "major repairs" (R. 80).

Collins testified that the defendants bought enough parts to put the machine in as good a shape when it left Fort Huachuca as when it left Los Angeles (R .86).

In support of the Sixth Assignment of Error, the plaintiffs on pages 16 and 21 of their Brief undertake to show that the Court erred in making the Conclusion of Law 1 "that the defendants, in accordance with the terms of the agreement, made all

the necessary minor or field repairs before delivering said machine to plaintiffs." They review much of the evidence introduced at the trial to show that when the machine was returned to plaintiffs it was in a damaged, deteriorated and unfit condition and was not in the condition in which it was received by the defendants, ordinary wear and tear excepted. The plaintiffs don't seem to realize that the equipment agreement (R. 7) provided for the manner in which repairs are to be made, and it did not provide that the machine should be returned in the same condition as it was when received, ordinary wear and tear excepted. The evidence shows that the defendants overhauled the machine at Fort Huachuca before it was returned to Los Angeles and that, with the exception of the pads on the caterpillar treads and that there were welded buckets instead of new buckets, the machine was in as good condition as when delivered (R. 103). It also appears from the Record that immediately after the machine was returned to Los Angeles it was put to work by plaintiffs on the Longridge Street job and the Magnolia Blvd. job and there operated from April 28th to July 21st, 1941 (R. 113), and, according to a disinterested witness, it was in good enough condition to do the work on those jobs (R. 116).

## FOURTH AND FIFTH ASSIGNMENTS OF ERROR

In their fourth and fifth assignments of error (Appellants' Brief 23-30) plaintiffs contend the fact that the machine was put to work at Van Nuys, California, (Longridge sewer and Magnolia Blvd.) is immaterial or that no repairs were necessary. If this

Finding of Fact was immaterial, it was not prejudicial and therefore not grounds for appeal.

We do contend, however, that when put to work on the Longridge sewer and Magnolia Blvd. jobs the machine was not in need of any necessary minor or field repairs mentioned in the equipment agreement. The evidence shows that when the machine was returned to Los Angeles it was put to work almost immediately on the Longridge sewer and Magnolia Blvd. jobs without any repairs to the parts listed in the Bill of Particulars (R. 17); that all the necessary minor or field repairs were performed before the machine left Fort Huachuca; that no repairs were made on the machine from the time it was returned until August, 1941, when it was overhauled in plaintiffs' yards in Los Angeles.

Let us here review the testimony of the witnesses: Brownfield testified "when I finished this repair work at Fort Huachuca, except for the pads on the Caterpillar treads and except for the fact that the buckets were welded buckets instead of new buckets the machine was in as good a condition as when it had been delivered." (R. 103).

Plaintiff Culjak testified "I do not remember making any repairs on the machine from the time it was returned from Fort Huachuca till we started to overhaul it in 1941 the last part of August." (R. 42).

Devine testified "From the time the machine returned from Fort Huachuca until August 28, 1941, I made minor repairs. I repaired the conveyor chains. I took out twisted links and put in new ones. I replaced maybe 25 links. We had those links in the warehouse. I put them in at Long Ridge on the first

trip there. They are different links. I did not put in any chain links such as you are referring to here. I put none of such links in at Magnolia or Long Ridge." (R. 62).

It must be noted that Devine refers to conveyor chain links and not to excavator chain links mentioned in the Bill of Particulars (R. 17).

Snelling, the City Engineer, testified: "So far as I could tell from watching the machine operate, it seemed to be in a reasonably good state of repair and in a condition where it would do the work it was supposed to do. I did not see anything that would indicate that the machine had been misused in Arizona. In any event, it was in good enough condition that it did the work when brought over there, without any major difficulty and no breakdowns of any consequence." (R. 114).

Collins testified: "Confining ourselves to the tracks and the chains, I would say that the deterioration or damage was in excess of ordinary wear and tear, but the work that they did on it over there to put it in shape overcame the difference between ordinary wear and tear and excessive wear and tear. That is the part outside of the Cats and others. In other words, they *brought* enough parts to put that machine in as good shape when it left over there as it was when it left here. It is my opinion, that it was in as good condition as it was when I inspected it about 30 days prior to leaving for Arizona with the exception of the cats and the chains, the cat being the pad and the chain." (R. 86).

Now when we consider all the evidence we must conclude that all necessary minor repairs were made

on the machine before it was returned to the plaintiffs. The agreement provides not that all minor repairs be made by defendants, but only *necessary* minor or field repairs. The use of the disjunctive indicates the parties considered field repairs and necessary minor repairs the same thing.

It seems quite probable that the machine was in need of other than necessary minor or field repairs which may be called major repairs, as distinguished from minor. Those were made at plaintiffs' yards in Los Angeles after the completion of the Van Nuys or the Longridge and Magnolia Blvd. jobs. Those repairs were made between August 28th and September 17th (R. 17-19).

The tractor pads, or multipedal slats, as they are sometimes called, were classified by Collins as a major repair job. Collins also testified that he did not think that the excavator chains would have anything to do with running a true line (R .89).

The testimony of Devine explaining what a hard job it was to replace these tractor, or multipedal pads or tracks shows that it was no necessary minor or field repair job. The excavator chain links may not have been in perfect condition, but it is quite evident from the performance of the machine at Longridge and Magnolia Blvd. that it was not necessary that they should be in order to operate the machine (R. 62).

The plaintiffs' claim for rental damages (Appellants' Brief 38), when we consider the use they made between April 28th and July 21, 1941, (R. 113) on the Longridge and Magnolia Blvd. jobs, should not

be taken seriously. The rule of law that should prevail in view of the facts in this case we hold is as follows:

> Where through an injury to property plaintiff is temporarily deprived of its use, the measure of his damage is the amount of the injury to the property, together with the value of its use during the time required by the exercise of proper diligence to secure its repair.
>
> 17 C.J. 878, Sec. 184.

If the plaintiffs had been diligent they would have ordered the pads on April 28, 1941, when they claimed to have discovered their need, instead of waiting until July 28, 1941 (R. 96). It is the law that there can be no recovery for loss which may have been prevented by reasonable effort on the part of the person injured.

> 17 C.J. 767, Sec. 96.

The best answer to plaintiffs' argument for rental damages is that which plaintiffs themselves used in their Memorandum in the trial court where they argued, "If the plaintiffs, instead of using the machine themselves, had put it up for repairs at once when it was returned to California, they would have been compelled to rent another trenching machine, and would have been entitled to the rental value which they would have had to pay (25 C.J.S. 601). While the machine was actually used for a period of ten days, or eighty hours, it was on two jobs for a period of better than thirty days, and they would have been compelled to rent a machine for thirty days or longer."

## SEVENTH, EIGHTH AND TENTH ASSIGNMENTS OF ERROR

In support of the Seventh, Eighth and Tenth Assignments of Error against the Court's Conclusions of Law 2, to-wit, that the plaintiffs are not entitled to the damages prayed for, the plaintiffs argue that the court below must have found that the machine was not in need of repairs upon its return, or, if it was, that defendants were not obligated to repair it. Appellants' Brief 30-38).

It is defendants' contention that when the machine was returned to Los Angeles it was not in need of any necessary minor or field repairs, and therefore, according to the agreement, the defendants were not obligated to repair it.

Plaintiffs refer to a conversation between Culjak and a man named Morrison in regard to the terrain at Fort Huachuca. Very likely, by this conversation plaintiffs undertake to infer negligence on the part of the defendants in operating the machine. However, if they intended to prove negligence, they should have alleged it in their complaint, which they have failed to do.

8 C.J.S. 336, Sec. 26(c), note 20.
45 C.J. 1072, Secs. 645-647.

This suit is not based on any conversation between plaintiff Culjak and somebody else about the terrain around Fort Huachuca, as plaintiffs intimate. It is based on that written agreement set forth in the complaint, which recites that the machine is to be used in the construction of a Government cantonment camp at or near Fort Huachuca, Arizona

(R. 6). Nothing is said in the agreement about the nature of the terrain, and nothing that confines the use of the machine to sand, loam, clay, gravel or rocky ground. Culjak, however, testified as follows: "I knew when I rented the machine that it was going to be used at Fort Huachuca. We do not say in the contract the kind of ground our equipment is to be used on, but we say our equipment is to come back just as it went. The contract says that the lessees should make all necessary minor or field repairs, but there is no such thing in the contract that we should make the major repairs. We are not to make any repairs on the project." (R. 125).

> The extent to which property which is the subject of the bailment can be used by the bailee must be determined by the contract of bailment, and the property can be used only to the extent and within the limitations provided by, or consonant with, such contract.
>
> 8 C.J.S. page 264, Sec. 26 b.

The leasing of the machine constituted a bailment for hire. The law provides that rights and liabilities under express contracts are, of course, controlled by the terms of the contract.

> 8 C.J.S. 257, Sec. 24, note 37;
> *Oklahoma Petroleum and Gasoline Company vs. Winship,* 200 Pac. 844;
> *New York Central Trust Company vs. Wabash R. Co.,* 50 Fed. 857;
> *Kennedy vs. Gardetto,* 27 N.E. 2d, 957-959.
>
> The rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties,

whether express or implied. Where there is an express contract, the terms thereof control, since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, increasing or diminishing their rights, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement.

8 C.J.S. page 255, Sec. 22;
*Coons vs. First National Bank,* 218 N. Y.S. 189;
*Bratt vs. Poole,* 178 P. 638;
*Geis vs. Mathes,* 280 P. 759.

In presenting their case in chief, the plaintiffs, beginning on page 31 of their Brief, maintain that the agreement is ambiguous in its language, and they very arbitrarily argue that the words in the agreement requiring the defendants to make all necessary minor or field repairs is but another way of saying that the bailee should make all ordinary or incidental repairs and return the bailed machine in the same condition as when received, ordinary wear and tear excepted. This, indeed, is a very simple method of altering the terms of a contract so as to completely change the meaning thereof.

From the very beginning the plaintiffs have been obsessed with the idea that the agreement provided that this machine should be returned to the plaintiffs in the same condition in which it was received by the defendants, ordinary wear and tear excepted, and counsel, Mr. Barry, early in July, 1941, wrote to the defendants: "After a careful study of the entire situation I cannot see how the lessee can escape liability for making necessary field repairs on the ma-

chine and returning the machine in as good condition as when received, ordinary wear and tear excepted. I am unable to convince myself that the damage to the machine is the result of ordinary wear and tear." (R. 65).

Then again, in their brief they frequently call attention to the fact that the machine was not returned in condition to render efficient, economic and continuous service, and that it was not returned in the condition in which it was received, ordinary wear and tear excepted. (Appellants' Brief 16, 21, 32). Plaintiffs should bear in mind that this is their case and the burden of proof is on them to show that the defendants did not make all the necessary minor or field repairs. No doubt the court below was impressed by this failure on the part of plaintiffs.

At the time they finished presenting their case, a motion to dismiss would have been in order and should have been urged. The defendants alleged in their pleadings, tried this case and are basing their appeal upon the theory that the machine should have been returned to the plaintiffs in the same condition in which it was received by the defendants, ordinary wear and tear excepted.

In support of this theory, the plaintiffs called two witnesses, Martin Culjak, one of the plaintiffs, and Pat Devine, a part owner of the machine (R. 61). These witnesses, in their direct examination chief, confined their testimony to the description of the damages done to the machine, and not until recalled to the witness stand after the defendants had completed their evidence did plaintiffs undertake to explain the terms of the agreement in regards to the

repairs. Then Culjak testified as follows: "the contract says that the lessee should make all necessary minor or field repairs, but there is no such thing in the contract that we should make the major repairs. We are not to make any repairs on the project" (R. 125).

Pat Devine, when recalled, testified: "minor repairs and field repairs are practically the same thing. A minor repair could be a bolt came loose. The key could get loose and the gear would shift a couple of inches. You have to stop to fix such things. A field repair would be anything that should be replaced. If a major part of the machine, like a shaft, was broken in the operation, that would be a field repair. I would say a field repair is any breakage or condition resulting from operation." (R. 128, 129) According to the above interpretations, the defendants were to make all necessary minor or field repairs and all other than minor or field repairs.

Such interpretations would make the terms of the contract nugatory.

> Contract of a bailment should not be interpreted so as to render it nugatory unless such construction is primarily required by its language.
>
> *Brooks v. Davis,* 1 N.E. (2d) 17.

We believe that Dan Cavanaugh gave the only clear and reasonable description of the terms "necessary minor or field repairs" when he testified that it meant to keep the machinery running; the repairs necessary or required to keep the equipment running on the job.

He further testified that "major repairs are considered such as overhaul repair, or some heavy shaft, tracks, or something like that, or it has to go into a shop or someplace outside of the field shop. I think the term field repairs would be the same as minor repairs. It would mean the repairs or work necessary to be done on the machine in the field to keep it running. It was not necessary to put on new pads, repair the pads, to keep the machine running on our job." (R. 120)

The only evidence on behalf of the plaintiffs in support of their theory of the case is that elicited from Cavanaugh on cross-examination when he agreed with counsel for plaintiffs that the terms "minor or field repairs" were the same as to put the machine back in the condition in which it was received, ordinary wear and tear excepted. This is very little consolation for their failure to prove their contention by their own evidence.

## NINTH AND ELEVENTH ASSIGNMENTS OF ERROR

It is quite apparent that plaintiffs inadvertently used the words "defendants" instead of "plaintiffs" in the 7th and 9th lines on page 39 of their Brief.

We contend that if the Court had permitted the plaintiffs to amend their complaint in the manner they requested at the time of trial, without giving the defendants an opportunity to investigate, it would have extended the most liberal rules of pleading beyond the breaking point.

In paragraph VII of their complaint (R. 5), it is alleged "that plaintiffs were further damaged by

reason of defendants failure to make said repairs in the sum of Fifteen Hundred Dollars ($1500.00)."

What could they mean by *said repairs* unless it was the repairs alleged in paragraph VI of said complaint. Besides, in their prayer, they omitted that extra $1500.00 and asked for judgment in the sum of $3600.38.

Then again in the Bill of Particulars they increased the damages alleged in said paragraph VI of said complaint from $2100.38 to $2519.80, but made no mention of any further damages. It does not seem reasonable that, in spite of all the authorities cited by plaintiffs, at the time of trial the plaintiffs should be permitted to amend their complaint so as to show other repairs than those enumerated in paragraph VI of the complaint and further expanded in the Bill of Particulars.

Now, in regard to the number of links in the excavator chain, Collins testified there were 150; others testified 180; and the Bill of Particulars specified 150. Had we known in time that the Bill of Particulars was not to be relied upon, we might have determined for certain the exact number of links. However, we are not much concerned about the number of links since it is our contention that the chain links were in good working order when the machine left Fort Huachuca (R. 106-107). The machine rendered efficient service at the Longridge and Magnolia Blvd. jobs (R. 112-117) without any new links being put in the excavator chain between the time the machine left Fort Huachuca in April and was repaired or overhauled at plaintiffs' yards in Los Angeles in August and September, 1941. It appears that the

trial court had good grounds to conclude that the way the machine served the plaintiffs after it left Fort Huachuca showed that it was not in need of any necessary minor or field repairs and that the excavator chain links were in satisfactory condition.

Notwithstanding the liberality of the new rules of Federal Procedure, we still believe that the defendants have a right to know what they are charged with before they go into court and they should have some assurance that the complaint and the Bill of Particulars should fairly state the right of action. We believe that if a radical change is made by amending the complaint at the trial, the defendants should be given a reasonable time to prepare the additional defense required. Such is all that was asked for by the defendants in this case, and the court indicated its willingness to grant. We believe that, according to the record in this case, under Rule 54(c), Federal Procedure, the relief to which the plaintiff is entitled depends upon the facts pleaded and not upon theories.

*Atwater v. North American Coal Corp.,*
36 Fed. Supp. 975.

## CONCLUSION

We are firmly convinced that the plaintiffs failed utterly to prove that the defendants did not perform their contract in full compliance with the terms thereof, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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